STATEMENT OF
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BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

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Good afternoon. My name is Judith Royster, and I am a professor and co-director of the Native American Law Center at the University of Tulsa College of Law in Tulsa, Oklahoma. Thank you, Mr. Chairman, for inviting me to testify before the Committee at this oversight hearing on Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country. I am honored to be here.

Although consent decrees involving tribal water rights date back at least to 1910, the modern era of tribal water rights settlements begins in 1978 with the settlement act for the Ak-Chin Indian Community in Arizona. Since 1978, Congress has enacted 27 Indian water rights settlement acts into law, affecting tribes in eight western states and Florida. This shift from litigation of tribal water rights to negotiated settlements is in significant part a reaction to the drawbacks of state general stream adjudications for determining tribal reserved rights to water.

Indian reserved right to water

Indian tribes have, as a matter of federal law, rights to sufficient water to fulfill the purposes for which their reservations or other lands were set aside. In 1908, in *Winters v. United States*,[1] the U.S. Supreme Court determined that when lands were set aside for the use and occupation of Indian tribes, sufficient water was impliedly reserved as well. Without water, the reservations could not support liveable communities. Water is necessary to life.

The *Winters* doctrine of tribal reserved water rights provides that because water is impliedly reserved with the land, the priority of Indian water rights is the date that the lands were set aside. As a result, tribal reserved water rights are prior and paramount to later-created state law water rights. Unlike rights created under state law, Indian water rights are not forfeited or abandoned for non-use. Today, in consequence, Indian tribes without adjudicated decrees or negotiated settlements

[1] Winters v. United States, 207 U.S. 564 (1908).

hold large, but unquantified and generally unused, rights to water.

In addition to *Winters* rights, some tribes may hold water rights under the approach of the 1905 decision in *United States v. Winans*.[2] In *Winans*, the Court construed a treaty that guaranteed the tribes the right to continue their aboriginal practices: in that case, the right to take fish. The Court determined that the treaty rights included certain implied rights, such as access to the fishing places, necessary to ensure that the right to fish can be exercised. Thus, if a treaty, statute, or agreement confirms aboriginal practices that require water – such as fishing or traditional agriculture – the right to sufficient water for those practices was impliedly reserved as well. These rights carry a priority date of time immemorial.

State general stream adjudications and Indian water rights

All western states have a process to determine rights to water under state law. Historically, however, the state courts and administrative agencies did not have jurisdiction over the property rights, including the water rights, of Indian tribes or the federal government. Instead, tribal and federal water rights, which arise under and are governed by federal rather than state law, were determined in federal court proceedings.

In 1952, Congress enacted the McCarran Amendment, which expressly permits the United States to be joined as a party in a state lawsuit "for the adjudication of rights to the use of water in a river system or other source."[3] These state proceedings, known as general stream adjudications, are large, complex, comprehensive lawsuits intended to determine all rights to water in a river system. At the end of the adjudication, the state should have a record of all water rights owners within that river system, their priority dates, points of diversion, permitted uses, flow rates, quantity of use, and so forth.

In 1976, the U.S. Supreme Court held that the United States could be joined as a party in a general stream adjudication not only to adjudicate federal water rights, but Indian tribal reserved water rights as well.[4] The Supreme Court also determined that, as a general matter, federal courts should abstain from hearing Indian water rights cases, in favor of state general stream adjudications. It noted, however, that state courts must apply federal law to determine the nature and extent of both tribal and federal water rights.

Nothing in the McCarran Amendment provides that Indian tribes can be joined as parties in state general stream adjudications. Because the federal government can be joined, however, and

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[2] 198 U.S. 371 (1905).

[3] 43 U.S.C. § 666(a).

[4] Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

required to represent tribal rights,[5] most tribes choose to waive their sovereign immunity to suit and voluntarily join as parties in order to represent their rights. As a result, most adjudications of Indian water rights since the mid-1970s have taken place in state court, as part of general stream adjudications.

Drawbacks to using state general stream adjudications to determine Indian water rights

The use of state general stream adjudications to determine Indian reserved rights to water has proved to have a number of well-documented drawbacks.

One significant drawback arises from the nature of general stream adjudications. Because they are comprehensive proceedings, often involving thousands of water rights, general stream adjudications may run for literally decades. The costs of such prolonged litigation are extensive, running into the tens of millions of dollars. During the course of the litigation, tribal and federal resources are devoted to the proceedings rather than to other uses and priorities. A state may permit new state-law uses to begin during the adjudication, further complicating the process.

Moreover, state court may be an unfriendly forum for tribes. State judges are, in most states, ultimately answerable to the voters. To the extent that tribal water rights are in conflict with, or perceived to be in conflict with, the water rights of state users, state courts may favor state users. In addition, in a majority of western states, the state water agency is more than simply a party to the water rights litigation. In most of the states, the water agency makes at least preliminary findings and determinations. Where the state water agency is both a representative of state interests and a preliminary fact-finder, tribes may well distrust the process to fairly consider tribal interests.

In addition to the historic conflict between states and tribes, state court rulings in general stream adjudications have varied significantly. Although the U.S. Supreme Court cautioned states to follow federal law in determining tribal water rights, state court interpretations of federal law are not uniform. For example, one state finds that the only purpose for which a reservation was created was agriculture, while another finds a broad purpose of creating a viable homeland. One state restricts the uses that tribes may make of their water rights, while others do not. One state determines that Indian water rights do not extend to groundwater, while others find that groundwater may, at least under certain circumstances, be used to fulfill the tribal right. These variances in the application of federal reserved water rights principles are not necessarily tailored to the needs of the parties, but rather to the various state courts' interpretation of federal precedent.

A final and crucial drawback to litigation of Indian water rights is the end result. The ultimate purpose of litigating Indian water rights is not only a declaration of those rights, but the ability to put the water to uses that best serve the needs of the Indian community. In general stream adjudications, Indian tribes receive determinations of water rights, but those rights are paper rights

[5] Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

only. At the end of a long, costly litigation process, the tribe has a recognized water right, but not "wet" water or the means of putting the decreed water to actual use. Moreover, given that the tribe itself may spend upwards of a million dollars to obtain the paper right, few if any tribal resources remain available to fund water projects and delivery systems. Similarly, the federal government may spend considerable resources helping to litigate Indian water rights, without being able to offer financial assistance for water projects after the water rights are determined.

Advantages of water rights settlements

In light of these substantial drawbacks of state general stream adjudications, negotiated settlements of Indian rights to water have significant advantages.

First, the settlement acts resolve tribal claims to water with respect to both the states and the federal government. At the heart of every settlement act is a quantification of the tribal right to water. Tribes waive their reserved rights to water under the *Winters* doctrine and their water claims against the United States. They agree, in general, to a lesser quantity of water than they could receive under the *Winters* approach of securing sufficient water to fulfill the purposes for which the land was set aside. In exchange, the tribes receive guarantees of financial assistance in developing their water resources.

Thus, the second and crucially important advantage of negotiated settlements is the promise of "wet" water. Every settlement act authorizes appropriations for water development or management projects, or more generally for economic development purposes. A few more recent settlements include mandatory appropriations. Costs are shared among the various interested parties, including the tribes, the states, and the federal government. The importance of this feature cannot be overstated. Tribes with litigated paper rights to water face enormous obstacles in getting that water into use; tribes with negotiated rights have some guarantee that financial assistance is forthcoming.

Third, water rights settlements are faster and less expensive than litigation through a general stream adjudication. Negotiated settlements are by no means quick or cheap. But compared to adjudications, negotiated settlements take less time and use fewer tribal, state, and federal resources to conclude. As settlements become more common, parties have greater expertise in the process, and prior settlements may serve as models for future negotiations.

Fourth, water settlements are flexible and tailored to the needs and circumstances of the parties. Unlike variances in adjudication decrees that result from inconsistent state court interpretation of federal law, variances in negotiated settlements serve the interests of all parties. Settlement acts often clarify issues that are not entirely resolved under federal precedent. For example, a significant number of settlement acts protect tribal uses of water for other than agricultural irrigation. Some settlements specify that the water rights may be used for any purpose, while others protect the tribe's ability to use part of its water rights for an instream flow to ensure that sufficient water remains in the river itself. Similarly, settlement acts may specifically address

groundwater rights. Settlements in the Southwest tend to do so, while settlements in the Northern Plains tend not to, indicating the relative importance of the groundwater issue in those regions.

As part of their flexibility, settlement acts often address issues that are outside the scope of a general stream adjudication. Often these involve issues of water use and administration for which there is currently no general statutory or regulatory authority. For example, the Secretary of the Interior placed a moratorium on the approval of tribal water codes back in 1975, pending the adoption of federal regulations. No regulations were ever issued, and thus tribes that require federal approval of their laws face a serious roadblock in regulating water rights. Several of the settlement acts address this issue directly, providing for the creation of a tribal water code to administer water rights, often with the Secretary of the Interior administering tribal water rights until the adoption of a tribal code.

As another example, tribes' ability to engage in water marketing is open to question under current law. Water marketing, generally defined as the lease or sale of water rights to another user, is gaining wide acceptance in western states as a means of ensuring that water is put to the most economic and beneficial use, without requiring the water rights holder to forego the value of the right. Water marketing can be enormously beneficial to tribes, ensuring that tribes receive the economic value of their water rights, particularly during times when the tribe itself is not able to put the water right to actual use. States and state-law water users may also benefit from tribal water marketing by having a reliable source of additional water at a reasonable cost.

Under current federal law, the sale or encumbrance of Indian property requires federal consent.[6] Because tribal water rights are property rights, it is likely that the lease of these rights requires congressional authorization. While no statute generally permits tribal water marketing, most of the settlement acts do. The tribes' ability to market their water rights is generally subject to certain limitations. Virtually all of the acts prohibit the permanent sale of tribal water rights, but rather authorize leasing. A significant number restrict the lease term to no more than 99-100 years. Tribes are often limited to marketing water from certain sources or, more often, to certain users such as nearby municipalities, benefitting local governments as well as the tribes. In most cases, the marketed water is expressly subject to state law during the period it is used off-reservation by the non-tribal users.

On occasion, water rights settlements address other water-related issues outside the scope of litigation. For example, one settlement included a hiring preference for tribal members in connection with a water project. Another addressed tribal-state relations in connection with water quality standards under the Clean Water Act.

The final advantage of water rights settlements over litigation is harder to quantify. Parties in litigation are in conflict with one another. It is the nature of litigation to have winners and losers. Even in a general stream adjudication, the proceedings can be adversarial. Negotiated settlements,

[6] Nonintercourse Act, 25 U.S.C. § 177.

at their best, are less so. The aim of a negotiated settlement is to reach a result that is beneficial to and acceptable to all parties. States, tribes, and the federal government must necessarily work together to reach a settlement before it is presented to Congress. The parties may not emerge from the process as friends, but a good process fosters respect and understanding. If negotiated water settlements lead to greater cooperation in state-tribal relations, that alone is an advantage worth pursuing.

Disadvantages of water settlements

Negotiated water settlements are not without their disadvantages. As noted above, faster and cheaper does not mean fast and cheap. Moreover, implementation of water settlements has been slow. Further proceedings are often necessary, funding must be appropriated, water projects designed and constructed, and so forth. The specific needs and means of fostering implementation of water rights settlements I leave to others at this hearing.

Conclusion

Tribal water rights will be determined, whether through general stream adjudications in state court or in negotiations among the parties. Despite some disadvantages to negotiated water settlements, the advantages of settlements to all parties – tribes, the federal government, the states, and often municipalities as well – as well as the relative advantages of settlement over adjudication argue in favor of increased use of Indian water rights settlements.

Even in this time of federal retrenchment, Indian water rights negotiations and settlements should not be abandoned. A significant number of tribes have successfully concluded settlements, but many more tribes are now in the process or even just beginning to consider negotiations. Those tribes should not be disadvantaged by the timing.

The federal government has a trust responsibility for Indian water rights. In the Western Water Policy Review Act of 1992, Congress "recognize[d] its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources."[7] The Department of the Interior, in its criteria and procedures for participation in tribal water settlements, similarly states that "Indian water rights are vested property rights for which the United States has a trust responsibility." As trustee for Indian tribes and property, the federal government should assure that the process of negotiated water rights settlements, including federal funding for water projects, is available to later-settling tribes as well as to those that have already settled their water rights.

[7] Pub. L. No. 102-575, § 3002(9), 106 Stat. 4600, 4695.